

October 17, 2024

**VIA ECF**

Honorable Gregory H. Woods  
Daniel Patrick Moynihan  
United States Courthouse  
500 Pearl St.  
New York, NY 10007-1312

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: 10/19/24
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**MEMORANDUM ENDORSED**

Re: *WCA Holdings III, LLC v. Panasonic Avionics Corporation*  
Case No. 1:20-cv-07472-GHW – Meet and Confer Joint Letter

Dear Judge Woods:

We write pursuant to the Court’s Order dated October 10, 2024, directing the parties to meet and confer and submit a joint letter reflecting the conference once completed. *See* Dkt. No. 169.

Plaintiff WCA Holdings III, LLC’s (“WCA”) continues to pursue the discovery motions described in its October 7 letters. The scope of that requested discovery has not changed.

The parties met and conferred on October 14, 2024. The parties agreed on the call that they had met their discovery conference obligations, and confirmed the same in writing following the meeting.

**WCA’s Position.**

WCA filed two letters on October 7, 2024 seeking relief from the Court related to outstanding discovery. The first sought documents described by a representative of Panasonic Avionics Corporation (“PAC”), Mr. Richard Kennedy, in his deposition. First, Mr. Kennedy described certain parts that could have theoretically been installed on WCA’s aircraft and the location of prices for comparable parts. Ex. A (Excerpts of Richard Kennedy Deposition of 9-27-24 at 306:2-7; 307:12-19) (describing list of “aspirational” Panasonic parts); *id.* (367:10-14, 18-20, 367:21-368:3, 12-14, 16-23) (testifying that prices for comparable parts to the “aspirational” Panasonic parts could be found in a contract between Panasonic and Lufthansa Technik). Mr. Kennedy also testified that there were likely other iterations of a marketing document, introduced as Kennedy Exhibit 23 at his deposition. *See id.* at 374:22-375:10; 376:9-11; 377:12-21.

Counsel for PAC has represented that PAC personnel have been unable to locate either the document showing prices for IDAIR components that Mr. Kennedy mentioned or iterations of Exhibit 23 from Mr. Kennedy’s deposition. PAC has stopped short of saying such documents did not exist; PAC has been unable to locate such documents in the three weeks since Mr. Kennedy’s deposition. WCA believes these documents may prove critical to its damages calculations and

presentation at trial, and, therefore, unless and until PAC can confirm that the documents do not exist, WCA continues to seek an order compelling production.

The second letter WCA filed on October 7, 2024 dealt with PAC's privilege log. WCA continues to believe that PAC is improperly or incorrectly asserting privilege as to (i) email attachments, and (ii) documents between non-lawyers identified vaguely as potentially seeking future legal advice. WCA has directed PAC to its letter, which identifies each specific log entry WCA identified as insufficient. WCA is unable to provide further analysis or identification of documents that it has not seen.

WCA's position is based on (1) the documents it has seen and (2) the statements made by counsel for PAC. As to the documents WCA has reviewed, for example, a document was used as an exhibit at Mr. Kennedy's deposition, which PAC clawed back in the middle of the proceedings. Again, counsel for WCA has fully reviewed that document; there is no basis for privilege because (i) no legal advice was sought or received, and (ii) no lawyer was included on the email. Despite the October 14 discovery conference, PAC continues to disagree.

As to the statements from counsel for PAC, they have represented both by phone and in writing that all remaining documents attached to an email sent to an attorney are privileged. Not so. PAC has provided no case law to support a situation in which a non-lawyer sends non-privileged documents to an attorney and it *per se* cloaks such attachments in privilege, even where the document is otherwise non-privileged and responsive to WCA's document requests.<sup>1</sup> PAC's counsel also confirmed that these attachments have not otherwise been produced to WCA from some other source. Counsel for PAC has also stated that a non-attorney who works with lawyers in the contract department establishes privilege in an email communication. Again, this is not a universally applicable rule. WCA agrees that in some cases, such as those in which non-attorneys relay advice provided by counsel, privilege may apply narrowly to the content of that relayed advice. It is not the case, however, that copying a non-attorney who sometimes works with lawyers in an email communication makes the entire communication subject to the attorney-client privilege. Again, the parties were unable to resolve this issue in the October 14 discovery conference.

### **PAC's Position**

**WCA's Privilege Challenges.** During the parties' 24-minute discovery conference, on October 15, 2024, WCA refused to identify the specific logged documents with which it takes issues. Instead, WCA challenged the categories of privileged documents and continued to claim that PAC's privilege assertions are deficient. As previously noted, PAC has in good faith reviewed the challenged documents on more than one occasion, recently released documents (despite a legitimate privilege claim) that could be released from the log, and provided WCA with a third supplemental and revised log on October 4, 2024 (the "10/4 Log"). *See* Dkt. No. 167 at 3 (citing Ex. M). The 10/4 Log contained updated and revised privilege descriptions and PAC produced

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<sup>1</sup> Were that to be the law, which it is not, one could see many employees abusing such a rule to prevent the disclosure of key documents in a lawsuit.

the released documents to WCA on the same day. *See id.* WCA's most recent submission here, makes clear that while it agrees with the privilege grounds asserted by PAC, WCA simply does not trust that PAC has properly withheld its documents. That is not a basis for *in camera* review and WCA's request should be denied.

As explained in the prior joint submission (Dkt. No. 167), WCA admits that email attachments of confidential drafts from in-house attorneys provided in connection with legal advice are privileged. *See, e.g.*, Log Nos. 82–89, 92–93, 118, 120, 130–31, 135–36, 181–84, 185–A–C, and 186–A–D. For the first time during the meet and confer, WCA asked whether the foregoing withheld email attachments had been produced. PAC offered to check but that was not good enough. PAC can confirm that the following email attachments have previously been produced to WCA: Log Nos. 82–89, 181–84, 185–A–C, and 186–A–D. *See, e.g.*, PAC0036398–PAC0036407, PAC0023054–PAC0023061, PAC0023070–PAC0023077. Regardless, each of the challenged email attachments is properly withheld as privileged. *See* Dkt. No. 167 (citing *In re County of Erie*, 473 F.3d 413 (2d Cir. 2007); *Carter v. Cornell Univ.*, 173 F.R.D. 92, 95 (S.D.N.Y. 1997) and *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 183–84 (2d Cir. 2007)). For example, Log Nos. 130–36 include an attorney draft and additional privileged emails with in-house counsel at a time when PAC reasonably anticipated litigation. Requiring PAC to provide further detail would render the privilege log meaningless.

As for communications between non-attorneys, WCA's principal complaint relates to Log No. 23,<sup>2</sup> which is an email with PAC's associate general counsel and his staff within the legal contracts department, that was clawed back on June 13, 2024. In addition, WCA challenges Log No. 202, which is another email with PAC's legal contracts department that was clawed back during the deposition of one of PAC's Rule 30(b)(6) witnesses. As discussed (Dkt. No. 167 at 5), privilege attaches to communications with non-attorneys working at the direction of counsel (*e.g.*, paralegals, secretaries, clerks) such as staff in PAC's Contracts Department, many of whom are attorneys. *See* Dkt. No. 167 (citing cases). One such person is Michael Fettig, Esq. (Sr. Contracts Manager, Legal Department). Log No. 23 (email subject "WCA xTV"), contains minimal redactions regarding information provided to Mr. Fettig for purposes of obtaining legal analysis. Later on in the email chain (PAC0014648–49), Keith Matulich, Esq. (Director of Contracts, Legal Department) is added and legal advice is sought regarding the WCA relationship. Log No. 202 which subject contains "WCA Concerns on Contract" involves communications with Roger Erickson (Sr. Director Contracts, Legal Department), who although not an attorney, reported directly to, and at the direction of, Mr. Matulich and Susan Hall (VP Legal Affairs). This document (like Log No. 23) is also minimally redacted where the communications were made to facilitate the rendering of legal services by PAC's legal contracts department.

Lastly, WCA's contention that PAC has refused to supplement its privilege log is wrong. *See* Dkt. No. 167 at 3. PAC has *repeatedly* offered to review its logged communications, but WCA has refused to specify the log numbers. While PAC believes its privilege descriptions are

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<sup>2</sup> WCA challenges Log Nos. 186–201 (iterations of the email chain in Log No. 23) for the same reasons it challenges Log No. 23.

sufficient, PAC is willing to provide additional detail to the extent the Court deems doing so necessary and so as not to burden the Court with *in camera* review.

**WCA's Belated Discovery Requests.** WCA seeks (1) documents showing pricing for "aspirational" LHT/IDAIR parts and (2) iterations of Kennedy Deposition Exhibit 23, the "eX1 Products and Services Description" document. During the meet and confer, PAC confirmed that based on its searched to date, PAC was unable to locate the requested documents. Therefore, PAC cannot confirm that such documents exist given that it has been unable to locate these documents. WCA's request should be denied because the requested documents do not exist based upon PAC's reasonable search to date. *See, e.g., Agerbrink v. Model Serv. LLC*, No. 14CIV7841JPOJCF, 2017 WL 933095, at \*5 (S.D.N.Y. Mar. 8, 2017) (explaining "[t]he standard for evaluating discovery is reasonableness, not perfection[.]" and denying portion of motion to compel given defendants' reasonable search).

Regardless, WCA's request to file a motion to compel such documents should be denied based on WCA's unreasonable delay in seeking such documents a mere *four* days before the fact discovery deadline. *See Sportvision, Inc. v. MLB Advanced Media, L.P.*, 18-CV-03025 (PGG) (VF), 2022 WL 2817141, at \*5 (S.D.N.Y. July 19, 2022) (denying discovery request raised by plaintiff "nearly two weeks before the then-close of fact discovery[.]").

Respectfully,

/s/ Christopher M. Wyant

Christopher M. Wyant  
K&L Gates LLP  
925 Fourth Avenue, Suite 2900  
Seattle, WA 98104-1158  
Counsel for Plaintiff WCA Holdings III, LLC

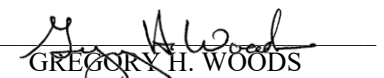
The Court will hold a status conference with respect to this matter by telephone on October 24, 2024 at 3:00 p.m. The parties are directed to the Court's Individual Rules of Practice in Civil Cases, which are available on the Court's website. Rule 2 of the Court's Individual Rules contains the dial-in number for the conference and other relevant instructions. The parties are specifically directed to comply with Rule 2(C) of the Court's Individual Rules.

/s/ Wanda French-Brown

Wanda French-Brown  
FOX ROTHSCHILD LLP  
101 Park Avenue, 17<sup>th</sup>  
New York, NY 10178  
Counsel for Defendant Panasonic Avionics Corp.

SO ORDERED.

Dated: October 19, 2024  
New York, New York

  
GREGORY H. WOODS  
United States District Judge

# EXHIBIT A

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UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

WCA HOLDINGS III, LLC, ) NO. 1:20-cv-7472  
)  
Plaintiff, )  
)  
v. )  
)  
PANASONIC AVIONICS CORPORATION, )  
)  
Defendant. )  
-----)

CONFIDENTIAL TRANSCRIPT

VOLUME II

VIDEO DEPOSITION OF RICHARD KENNEDY

Irvine, California

Friday, September 27, 2024

Reported by:

Heidi Hummel-Grant

CSR No. 12556

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UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

WCA HOLDINGS III, LLC, ) NO. 1:20-cv-7472  
)  
Plaintiff, )  
)  
v. )  
)  
PANASONIC AVIONICS CORPORATION,) )  
)  
Defendant. )  
\_\_\_\_\_)

CONFIDENTIAL TRANSCRIPT

VOLUME II

Video deposition of RICHARD KENNEDY, taken  
on behalf of Plaintiff, at 1 Park Plaza, 12th Floor,  
Irvine, California, beginning at 9:45 a.m. and  
ending at 12:11 p.m., on Friday, September 27, 2024,  
before Heidi Hummel-Grant, Certified Shorthand  
Reporter No. 12556.

1 APPEARANCES:

2

3 For Plaintiff:

4 K&L GATES LLP

5 BY: CHRISTOPHER M. WYANT (pro hac vice)

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11

12 For Defendant:

13 FOX ROTHSCHILD LLP

14 BY: JAMES H. MCCONNELL

15 WANDA FRENCH-BROWN

16 101 Park Avenue

17 17th Floor

18 New York, New York 10178

19 212.878.7900

20 jmcconnell@foxrothschild.com

21

22 Also present:

23 BERKLEY KIELHACK, VIDEOGRAPHER

24

25



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RICHARD KENNEDY

Examination:

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MR. WYANT

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^INSTRUCTED NOT TO ANSWER

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1 Irvine, California

2 Friday, September 27, 2024, 9:45 a.m. - 12:11 p.m.

3

4 THE VIDEOGRAPHER: Good morning. We are

5 going on the record at 9:45 a.m. on Friday, 09:45

6 September 27th, 2004.

7 Please note that the microphones are

8 sensitive and may pick up whispering and private

9 conversations. Please mute your phones at this

10 time. 09:45

11 This is Media Unit 1 of the video recorded

12 deposition of Richard Kennedy, Volume II, taken by

13 counsel for plaintiff in the matter of WCA Holdings

14 III, LLC versus Panasonic Avionics Corporation,

15 filed in the United States District Court for the 09:45

16 Southern District of New York, Case Number

17 1:20-cv-7472. The deposition is located at

18 K&L Gates LLP, 1 Park Plaza, 12th Floor, Irvine,

19 California, 92614.

20 My name is Berkley Kielhack representing 09:45

21 Veritext, and I'm the videographer. The court

22 reporter today is Heidi Hummel-Grant from the firm

23 Veritext. I'm not related to any party in this

24 action nor am I financially interested in the

25 outcome. 09:46

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1 BBJ. 10:15

2 As part of this -- this was entirely a  
3 financial analysis to determine could we be  
4 compet -- could we provide a price that matched the  
5 ships at expectation. So when we get over to the 10:15  
6 cost and the priced on the right-hand side,  
7 basically what I was coming up with is what is our  
8 profit margin in order to be competitive in this  
9 market. Okay?

10 The configuration that I came up with for 10:15  
11 all of these aircraft used known parts and parts  
12 that would have to be developed in order to get  
13 there. They didn't exist at the time, they only  
14 existed on paper. And again, it was with the  
15 concept of those parts -- because at the time, up 10:16  
16 until 2016, we had partnered with LHT, we were using  
17 LHT parts in our system. This effort was to remove  
18 LHT off the aircraft.

19 Q Were there comparable LHT parts to the  
20 ones you would have had to create that were new? 10:16

21 A Yes. Though I would say that mine would  
22 be more capable. Mine. Panasonic's.

23 Q And you put together a spreadsheet with  
24 a list of part numbers in it as a companion to this  
25 document that is Exhibit 20? 10:16

1 A Yes. 10:16

2 Q And those part numbers, did they exist  
3 at the time or were they aspirational?

4 A Aspiration -- well, the ones that  
5 existed, they would have exist, the other ones would 10:16  
6 have been aspirational. I think I actually used  
7 their name in the description.

8 Q So if there is a part number listed,  
9 that's an existing part number?

10 A If you want to give me an example, if we 10:16  
11 want to route this as an exhibit, I -- I can point  
12 out which ones were aspirational versus not.

13 THE REPORTER: Exhibit 21.

14 (Exhibit 21 was marked for identification by  
15 the Certified Shorthand Reporter, a copy of which is 10:17  
16 attached hereto.)

17 MR. WYANT:

18 Q So the court reporter has marked  
19 Exhibit 21, which I'll tell you is an Excel  
20 spreadsheet that is Panasonic 37265, and it is a 10:17  
21 spreadsheet that has multiple tabs.

22 What we're looking at here is what's called  
23 the detail tab.

24 A Um-hum.

25 Q You understand that? 10:17

1 So why don't we take a break? 11:27

2 THE WITNESS: Sure.

3 THE VIDEOGRAPHER: Going off the record at

4 11:27 a.m.

5 (A recess is taken.) 11:27

6 THE VIDEOGRAPHER: We are back on the record

7 at 11:43 a.m.

8 MR. WYANT:

9 Q Going back to Exhibit 21, just a couple

10 of more quick questions about that. 11:43

11 A Sure.

12 Q So I think you said that for the

13 aspirational parts there would have been a

14 comparable IDAIR or LHT part for each one; is that

15 right? 11:43

16 A Correct, yes.

17 Q And would there be pricing for each of

18 those comparable parts in the Panasonic price

19 database?

20 MR. MCCONNELL: Objection to form. 11:44

21 THE WITNESS: Possibly. I don't know if we

22 had loaded those particular LHT part numbers into

23 our system; I know we had loaded the early

24 equipment into the system.

25 The -- once -- once the joint venture was 11:44

1 solidified, then there was no reason to load them 11:44  
2 into Oracle because IDAIR was doing all of the work  
3 and Panasonic wasn't buying those parts necessary  
4 from LHT. Again, as part of the JV there were  
5 agreed-to pricing structures between all three 11:44  
6 companies. I -- I don't know for sure if the  
7 equivalent LHT part that this one kind of references  
8 would have been there or not.

9 MR. WYANT: Okay.

10 Q So setting aside the actual pricing 11:44  
11 database for a discrete control unit that was  
12 manufactured by LHT or IDAIR, does Panasonic have  
13 any document anywhere where you could go look and  
14 see what that price would be?

15 MR. MCCONNELL: Objection to form. 11:45

16 THE WITNESS: Sorry, price for which one?

17 MR. WYANT:

18 Q The LHT or IDAIR version of a discrete  
19 control unit.

20 MR. MCCONNELL: Same objection. 11:45

21 THE WITNESS: Again, there was contracts  
22 language between LHT and Panasonic that defined the  
23 JV. The pricing agreement for LRUs were -- were  
24 defined within that document. For LHT they had an  
25 associated -- so they had -- they had an actual 11:45

1 price list that was about, you know, maybe 30 part 11:45  
2 numbers long that said, "This is what the cost of  
3 this unit is," to either Panasonic or to IDAIR.

4 For Panasonic what the agreement was -- as  
5 we referenced earlier, we have FOB and S. Okay? 11:45  
6 There was a discount off of S, which is what IDAIR  
7 purchased the part at, and I can't remember what the  
8 discount was off the top of my head right now.

9 MR. WYANT:

10 Q That's all very helpful. 11:45

11 But just keep it real simple: Is there any  
12 way you could go find out the price of the discrete  
13 control unit for a version of that part that was  
14 manufactured by either IDAIR or LHT?

15 MR. MCCONNELL: Objection to form. 11:46

16 THE WITNESS: Again, within the joint  
17 venture agreement between Panasonic and Lufthansa,  
18 in conjunction with the joint -- the joint venture  
19 itself, IDAIR, there was an agreed-to price list  
20 that was included as part of the -- I think it's an 11:46  
21 amendment to that joint venture contract that  
22 defines what the pricing is. And it would get  
23 updated, I think, every one to two years.

24 MR. WYANT:

25 Q And that would include things like this 11:46

1 discrete control unit? 11:46

2 MR. MCCONNELL: Objection to form.

3 THE WITNESS: It wasn't called the discrete  
4 control unit, but it was a -- a functionally  
5 equivalent box in that perspective. 11:46

6 MR. WYANT: Okay.

7 Just for the record, we're going to rest --  
8 request copies of whatever documents and agreements  
9 would identify the prices for the comparable LHT or  
10 IDAIR parts that are listed in Exhibit 21. 11:47

11 MS. FRENCH-BROWN: You're asking for the  
12 joint venture agreement between LHT and Panasonic?

13 MR. WYANT: If -- if it has the pricing for  
14 the parts identified on Exhibit 1 -- or 21, yes.

15 MS. FRENCH-BROWN: If it has it, we'll -- 11:47  
16 we'll look into that. If the document still  
17 exists, we'll look into it.

18 MR. WYANT: Okay.

19 THE REPORTER: Exhibit 22.

20 (Exhibit 22 was marked for identification by  
21 the Certified Shorthand Reporter, a copy of which is  
22 attached hereto.)

23 MR. WYANT: Okay.

24 Q Exhibit 22 is PAC37172 through 21.

25 Do you recognize this document? 11:47



1 Q I'm not going to ask any questions about 11:52  
2 it. I just wanted to know if that's what Project  
3 Mithril was.

4 A Yes.

5 Q Similarly, this giant document, which is 11:52  
6 3765 through 37869, does that also relate to  
7 Project Mithril?

8 MR. MCCONNELL: Do you have copies for us?

9 MR. WYANT: Yeah.

10 Q Or is it something different? 11:52

11 A This is something different. This is  
12 not related to Project Mithril.

13 MR. WYANT: We'll mark this one.

14 THE REPORTER: Exhibit 23.

15 (Exhibit 23 was marked for identification by 11:52  
16 the Certified Shorthand Reporter, a copy of which is  
17 attached hereto.)

18 MR. WYANT:

19 Q So as I noted, Exhibit 23 is 37675  
20 through 37869. 11:53

21 A Um-hum.

22 Q Can you tell me what this is?

23 A This is a document that Panasonic  
24 marketing produces for customers, primarily  
25 commercial, it is what we refer to as our product 11:53

1 and services description document. It is a -- it -- 11:53  
2 it -- it's basically -- things that are available or  
3 could be available as part of an eX1 system  
4 delivery. It's -- some of this is -- some of the  
5 information that's in here would be aspirational; 11:53  
6 some of it would be existing, depending on where  
7 things are in development. Again, this is more of  
8 a -- what I'd call a marketing document to basically  
9 figure out what would an airline customer be  
10 interested in. 11:54

11 So again, the aspirational stuff will get  
12 stuck in here, and if -- if an airline -- if  
13 airlines basically say, "We don't like it," then it  
14 will get removed. This is more of a -- a living  
15 document that as -- as technology progresses, as we 11:54  
16 deal with obsolescence of -- if a part becomes  
17 obsolete, we can't build it any more, then they'll  
18 get -- remove it from here. They may introduce a  
19 replacement part based upon that, or we might  
20 just -- you know, we might just say, "Well, we're 11:54  
21 not going to reproduce that part any more."

22 So -- but this is really more of a -- for  
23 instance, if you're an airline and you came to us  
24 saying, "I want to buy some 737s. I have got fifty  
25 737s, I want to put your eX1 system on it. What -- 11:54

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1 what can you provide me?" This would probably be 11:54  
2 sent to them. And then obviously, again, there is  
3 so many pages here, people don't even tend to look  
4 at it, but it is a document that we produce in order  
5 to -- to meet that function. 11:55

6 Q So the first page is the initial  
7 release, it says on the reason for revision?

8 A Yeah.

9 Q Was this the first version of this  
10 document? 11:55

11 A More than likely, yes.

12 Up until that point in time we had a -- we  
13 had an eX2 document back in the -- in the late  
14 2000s.

15 Honestly speaking, what I would say is this 11:55  
16 was kind of a backfill. We realized we needed the  
17 document, we didn't have the document and somebody  
18 said, "Well, maybe we need to go off and create  
19 one." There was a drive to release one for each  
20 system around this time frame in -- inside the 11:55  
21 company. Prior to that there was just a -- a PSDD  
22 for eX2 I think at that point in time.

23 Q Do you know if subsequent to this  
24 initial release there were iterations of this  
25 product and services description document for eX1? 11:56

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1 A This is certainly the first one for eX1 11:56  
2 as it's defined as an initial release.

3 There was -- there is a prior to PSDD which  
4 was, again, more eX2 centric, more -- more wide-body  
5 centric I guess is what I would say. And then it 11:56  
6 was decided that, "Hey, we should probably create a  
7 PSDD for every single system," and so there's --  
8 there's a PSDD for eX1, there's a PSDD for  
9 eXConnect, there's a PSDD for product and services.  
10 They've -- they're -- I think there's like six or 11:56  
11 seven of these things.

12 Q My question's a little different, which  
13 is: Did this document get updated after its initial  
14 release?

15 A Oh, probably. I would -- I would have 11:56  
16 to go back and look at the revision history.

17 This is maintained in our document release  
18 system as a part number. So if there's a revision  
19 update it would show up in -- inside what we would  
20 purchase, Agile, which is our product -- document 11:57  
21 repository system.

22 Q Do you know if this document still  
23 exists today? Still being used today in some  
24 version?

25 A Almost certainly. 11:57